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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

CONSOLIDATED X-RAY SERVICE CORPORATION,
Petitioner,

v.

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J. A. MCMAHON, A. W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, and CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 2, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether trustees of a union's pension and welfare fund, whose claims of delinquent employer contributions are based upon a disputed interpretation of the coverage clause of the collective bargaining agreement between the employer and the union, are obligated to attempt resolution of the dispute through the agreements' mandatory grievance and arbitration procedures before instituting suit against the employer to recover the alleged delinquency.*

II. Whether language in collective bargaining agreements which states that "deliberate failure or refusal [by the employer] ... to make deduction and/or remittance [of dues to the Union] as herein provided ... shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions" relieves the Union from the obligation to resolve a dispute regarding the interpretation of the agreements' coverage clauses through the agreements' mandatory grievance and arbitration provisions before resorting to such "economic and/or legal sanctions."

III. Whether an employer's refusal to deliver to auditors for a union records pertaining to work which the employer contends is beyond the coverage of the collective bargaining agreement constitutes bad faith entitling the union to an award of attorney fees against the employer.

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* Similar questions are pending before the Court in Cause No. 82-1860, styled *Schneider Moving and Storage Co. v. Robbins, et al.*, and Cause No. 82-1862 styled *Prosser's Moving and Storage Co. v. Robbins, et al.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. The Court of Appeals' determination that the Pension Trustees and Welfare Trustees were not required to attempt to exhaust mandatory grievance and arbitration provisions of the collective bargaining agreements raises important questions of federal law and policy, is inconsistent with decisions of this court, and conflicts with other circuit court decisions	6
II. The Court of Appeals' holding that the Union was not required to exhaust mandatory grievance and arbitration provisions before resorting to "economic and/or legal sanctions" is a glaring contravention of the congressionally and judicially declared national policy favoring arbitration of labor disputes, and is contrary to other circuit court decisions	13
III. The Court of Appeals' decision affirming the award of attorney fees for the Union is contrary to the "American Rule" to which this court has consistently adhered	15
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX A	1a
APPENDIX B	23a
APPENDIX C	37a
APPENDIX D	39a

TABLE OF AUTHORITIES

Cases	Page
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	15
Bowen v. United States Postal Service, ____ U.S. ____, 112 L.R.R.M. 2281, 51 U.S.L.W. 4051 (1983)	10, 13
Bradley v. School Board of Richmond, 416 U.S. 696, (1974)	16
Bricklayers, Masons & Plasterers International Union v. Stuart Plastering Co., Inc., 512 F.2d 1017 (5th Cir. 1975)	9, 10
Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 698 F.2d 802 (6th Cir. 1983), cert. filed	16, 17
Central States Southeast and Southwest Areas Pension Fund v. CRST, Inc., 641 F.2d 616 (8th Cir. 1981)	16
Central States Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc., 625 F.2d 171 (7th Cir. 1980)	11
Del Costello v. International Brotherhood of Teamsters, 462 U.S. ____, 51 U.S.L.W. 4693 (1983)	7, 10, 12
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1975)	7, 10, 12
Johnston-Tombigbee Furniture Manufacturing Co. v. Local Union No. 2462, 596 F.2d 126 (5th Cir. 1979)	14, 15
Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 102 S.Ct. 851 (1982)	6, 8, 10
Laborers Health and Welfare Trust Fund v. Kaufman & Broad of North California, Inc., 707 F.2d 412 (9th Cir. 1983)	11
Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960)	6, 7
Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union, 345 F.2d 757 (9th Cir. 1965)	15
Mullins v. Kaiser Steel Corp., 642 F.2d 1302, 1312 (D.C. Cir. 1980) reversed *sub nom Kaiser Steel v. Mullins*, 455 U.S. 72, 102 S.Ct., 851 (1982)	6

TABLE OF AUTHORITIES (Continued)

Cases, continued	Page
National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, 101 S.Ct. 2789 (1981)	9
Nolde Bros., Inc. v. Balcery Workers, 430 U.S. 243 (1977)	13
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1964)	8, 9, 10
Robbins v. Prosser's Moving & Storage Co., 700 F.2d 433 (8th Cir. 1983) (en banc) cert. filed	11
Runyon v. McCrary, 427 U.S. 160 (1976)	17
San Pedro Fishermans Welfare Trust Fund v. DiBernardo, 664 F.2d 1344 (9th Cir. 1982)	16
United Mineworkers of America Health and Retirement Funds v. Robinson, 455 U.S. 562, 102 S.Ct. 1226 (1982)	12
United States v. Carter, 353 U.S. 210 (1957)	9
United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	13, 14
Vaca v. Sipes, 386 U.S. 171 (1967)	8, 9, 10, 11
Waverly Mineral Products Co. v. United Steelworkers of America, 633 F.2d 682 (5th Cir. 1980)	14

Statutes

National Labor Relations Act	
29 U.S.C. §173(d) (1976)	2, 7
29 U.S.C. §185 (1976)	2, 4, 7
29 U.S.C. §186 (1976)	2, 9
Employee Retirement Income Security Act, as amended	
29 U.S.C. §1132 (1976)	4
29 U.S.C. §1145 (1981)	7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Consolidated X-Ray Service Corporation ("Consolidated") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judg-

ment of May 31, 1983 in *Forrest Bugher, et al. v. Consolidated X-Ray Service Corporation*, No. 81-1349. *

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 705 F.2d 1426; it appears as Appendix A to this Petition. The judgment of the District Court from which appeal was taken, and the District Court's Memorandum Opinion, which is reported at 515 F.Supp. 1180, appear as Appendix B. The orders of the Court of Appeals denying Consolidated's petition for rehearing and suggestion for rehearing en banc appear as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1983. A timely motion for rehearing and suggestion for rehearing *en banc* were denied on August 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Sections 203(d), 301 and 302 of the National Labor Relations Act (the "Act"), 29 U.S.C. §§173(d), 185, 186 (1976). These statutory provisions are set forth in Appendix D.

STATEMENT OF THE CASE

Consolidated and Respondent International Union of Operating Engineers, Local 2, AFL-CIO (the "Union"), entered into a collective bargaining agreement to be effective from February 17, 1971 through February 16, 1974. The agreement covered "all employees engaged in field non-

* When this suit was instituted, Consolidated was a wholly owned subsidiary of Lomas & Nettleton Financial Corporation, which has its principal office in Dallas, Texas. Consolidated is now a wholly owned subsidiary of Costain Process Engineering & Construction Ltd., which has its principal office in London, England.

destructive testing." It contained a "checkoff" provision which obligated Consolidated to deduct union dues from covered employees' pay and "remit the amount deducted to ... the Union ... The deliberate failure or refusal ... to make deduction and/or remittance as herein provided ... shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions."

The agreement also required Consolidated to make specified contributions in behalf of employees "covered by this agreement" to the Union's pension fund, the trustees of which were Respondents Forrest Bugher, Richard Wren, Reese Hammond, J. A. McMahon, A. W. McIntyre, Hailey Roberts, John E. Cuilerton and Richard Dennis (the "Pension Trustees"); and to the Union's Health and Welfare Fund, the trustees of which were Respondents Carl B. Pratt, Vergil Belfi, John Faust and Harold B. Huhn (the "Welfare Trustees").

The agreement defined the term "grievance" to "mean a dispute arising between the parties to this agreement or between any employee or employees covered by this agreement and the company ..." It specified the procedure by which "grievances or disputes as defined in this article shall be handled." The last step of the grievance procedure was arbitration.

During negotiations the Union and Consolidated excised from the agreement provisions which would have incorporated the Union's pension fund trust instrument and the Union's welfare fund trust instrument.

On July 8, 1971, Consolidated and the Union executed a "Central Pension Fund of the International Union of Operating Engineers and Participating Employers Participating Agreement." It expressed cognizance of the "agreement and declaration of trust" which established the Union's pension

fund; stated that "In accordance with ... a collective bargaining agreement" Consolidated was to make contributions to the pension fund "as set forth in said collective bargaining agreement"; and stated that the contributions "shall be in effect for the period stipulated in said collective bargaining agreement."

Consolidated and the Union executed a similar collective bargaining agreement and "Pension Fund Participating Agreement" effective for the period February 17, 1974 until February 16, 1977.

In 1975 auditors for the Pension Trustees and Welfare Trustees commenced an audit of Consolidated's contributions to the funds. Consolidated delivered to the auditors extensive records pertaining to work which was within the coverage of the collective bargaining agreements, but declined to produce records pertaining to work which Consolidated contended was beyond the coverage of the agreements.

Based upon the audit, which was completed in February of 1976, the Pension Trustees, Welfare Trustees and Union claimed that Consolidated was delinquent in contributions to the funds and remittances of dues to the Union for the period February 20, 1971 through December 31, 1975. Consolidated contended that the Pension Trustees, Welfare Trustees and Union erroneously demanded fund contributions and dues remittances for employees who were not members of the Union and for work which was beyond the scope of the coverage of the applicable collective bargaining agreements.

The Pension Trustees, Welfare Trustees and Union thereupon instituted this suit to recover from Consolidated the alleged delinquent fund contributions and delinquent dues remittances. They asserted jurisdiction under Section 301 of the Act and Section 502 of the Employee Retirement In-

come Security Act ("ERISA"), 29 U.S.C. § 1132, and alleged that Consolidated violated the collective bargaining agreement provisions for contributions to the funds and remittances of dues to the Union. Consolidated defended on the ground, among other things, that the Pension Trustees, Welfare Trustees and Union failed to exhaust, or attempt to exhaust, the agreements' mandatory grievance and arbitration provisions.

Following nonjury trial, the District Court held that the Pension Trustees, Welfare Trustees and Union were entitled to all of the relief sought. It recognized that the controversy was "essentially based on differing interpretations of the coverage clauses of the collective bargaining agreements" App. B at 30a, but concluded that the Pension Trustees, Welfare Trustees and Union were not required to exhaust the agreements' grievance and arbitration procedures, App. B at 26a-27a. Based on this opinion, the District Court entered judgment for amounts found to be due as delinquencies for the period February 20, 1971 through December 31, 1975, plus attorney and audit fees, interest and costs, App. B at 33a-36a.

In an opinion dated May 31, 1983, a panel of the Court of Appeals affirmed. It held, among other things, that (1) the Pension Trustees and Welfare Trustees were not required to attempt to exhaust the agreements' grievance and arbitration procedures because they were "not parties to the agreements" App. A at 7a-8a, the pension and welfare trust fund instruments "authorized the trustees to file suit to collect delinquent employer contributions" App. A at 8a-9a, and "to impose these arbitration procedures upon the trustees would undermine the vitally important independence of the pension and welfare funds" App. A at 9a-14a; (2) the Union was not required to exhaust the agreements' mandatory grievance and arbitration procedures before resorting to "economic and/or legal sanctions" because the Union had

not "agreed to arbitrate its claims for delinquent working dues, regardless of whether Consolidated contends that its refusal to contribute is in some way justified" App. A at 14a-15a; and (3) Consolidated's refusal "to turn over certain reports and contracts" constituted "bad faith" which entitled the Union to an award of attorney fees, App. A at 20a-21a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DETERMINATION THAT THE PENSION TRUSTEES AND WELFARE TRUSTEES WERE NOT REQUIRED TO ATTEMPT TO EXHAUST MANDATORY GRIEVANCE AND ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENTS RAISES IMPORTANT QUESTIONS OF FEDERAL LAW AND POLICY, IS INCONSISTENT WITH DECISIONS OF THIS COURT, AND CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS.

The Court of Appeals held that the Pension Trustees and Welfare Trustees were not required to attempt to exhaust the grievance and arbitration provisions of the collective bargaining agreements because they were "not parties to the collective bargaining agreements" and "the pension fund trust instrument and the health and welfare fund trust instrument . . . authorized trustees to go directly to court to pursue delinquent employer contributions".

In *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1312 (D.C. Cir. 1980) reversed *sub nom Kaiser Steel v. Mullins*, 455 U.S. 72, 102 S.Ct., 851 (1982), the District of Columbia Circuit Court of Appeals expressed a similar view. Citing *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), it said:

> "As a rule, third-party beneficiaries, like the trustees here, are subject to the contract defenses of nonperforming promissors. But the trustees of a union welfare

> fund are sometimes immune from contract defenses that could be asserted against the Union itself because such a rule better serves the concern of federal labor policy to protect Union members and their families from the actionable wrongs of their Union representatives."

This Court reversed the circuit court's decision, rejected the circuit court's interpretation of *Lewis v. Benedict Coal Corp., supra,* and said, "As the Court of Appeals recognized, '[T]hird-party beneficiaries, like the trustees here, are subject to the contract defenses of nonperforming promissors,'", 102 S.Ct at 859, n. 8. This Court also held that in enacting Section 306(a) of ERISA, 29 U.S.C. §1445 (1981) Congress did not implicitly repeal "the antitrust laws, the labor laws, and any other statute which might be raised as a defense to a provision in a collective bargaining agreement requiring an employer to contribute to a pension fund", 102 S.Ct. at 862.

Section 203(d) of the Act provides, "[F]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" App. D at 39a.

Pursuant to this statutory provision of the federal labor laws, failure to attempt to exhaust mandatory grievance and arbitration provisions constitutes a defense to an action under Section 301 of the Act for breach of a collective bargaining agreement, *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. _____, 51 U.S.L.W., 4693, 4696 (1983); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 562-563 (1975) ("Congress has specified ... that 'final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes ...' This Congressional policy 'can be effectuated only if the means chosen by the parties for settlement

of their differences under a collective bargaining agreement is given full play.' ..."); *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) ("Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement"); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1964) ("Federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by the employer and Union as the mode of redress ... It cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so").

In the case at bar, therefore, while the Pension Trustees and Welfare Trustees were not signatory parties to the collective bargaining agreements, they were, nevertheless, "third-party beneficiaries" of the agreements who were "subject to the contract defenses of nonperforming promissors", *Kaiser Steel Corp. v. Mullins, supra.* Those defenses included failure to attempt to exhaust the mandatory grievance and arbitration provisions of the applicable collective bargaining agreements.

The Pension Trustees and Welfare Trustees were not claiming breach of the pension fund trust instrument or the health and welfare fund trust instrument (to which Consolidated never agreed). They were claiming breach of the collective bargaining agreement. Accordingly, the Pension Trustees and Welfare Trustees were "bound by the terms of that agreement which govern the manner in which contractual rights may be enforced" and were obligated at least

to "attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement", *Vaca v. Sipes, supra; Republic Steel Corp. v. Maddox, supra.*

The Court of Appeals in the case at bar reasoned further, however, that "to compel the trustees to follow those procedures would place the Union in control of whether payments should in fact be demanded, in what amount, and from which employers. By carelessness or deliberate refusal to act, the Union could completely thwart the trustees' ability to administer and insure payments to the trust funds" App. A at 11a.

The authority cited by the Court of Appeals for this determination was *Bricklayers, Masons & Plasterers International Union v. Stuart Plastering Co., Inc.*, 512 F.2d 1017 (5th Cir. 1975) in which the Court of Appeals construed Section 302 of the Act, App. A at 9a-11a.

The Court of Appeals' reasoning is simply incorrect. Fund trustees cannot "require employer contributions not required by the original collectively-bargained contract ... [T]he trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund,'", *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 2789, 2798 (1981) (emphasis the Court's). The trustees "stand in the shoes of the employees and are entitled to enforce their rights", *United States v. Carter,* 353 U.S. 210, 220 (1957). The terms of the collective bargaining agreements, which the trustees are obligated to enforce, include mandatory grievance and arbitration procedures. The individual employees, in whose shoes the trustees stand, are required to attempt to exhaust those mandatory grievance and arbitration procedures, *Republic Steel Corp. v. Maddox, supra.* Nothing in Section 302 of the Act or in the Court of Appeals'

Stuart Plastering decision relieves fund trustees from the obligation to attempt to exhaust those mandatory procedures. Fund trustees "have no special status which exempts them from the general rule" that failure to attempt to exhaust mandatory grievance and arbitration provisions is a defense to an action for breach of a collective bargaining agreement, cf. *Kaiser Steel Corp. v. Mullins, supra,* 102 S.Ct. at 859 n.8.

Contrary to the Court of Appeals' reasoning, obligating the Pension Trustees and Welfare Trustees to attempt to exhaust the agreements' grievance and arbitration procedures would not place the Union in unfettered control. If the Union was "careless" or "deliberately refused to act" the trustees (as well as the individual employees) would have a cause of action not only against Consolidated but also against the Union for violation of the duty of fair representation, *Del Costello v. International Brotherhood of Teamsters, supra,* 51 U.S.L.W. at 4696 ("Ordinarily ... an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement ... However, this rule works an unacceptable justice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the Union, notwithstanding the outcome or finality of the grievance or arbitration proceeding"); *Bowen v. United States Postal Service,* ____ U.S. ____, 112 L.R.R.M. 2281, 51 U.S.L.W. 4051 (1983); *Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes, supra.* It cannot, however, be said "that contract grievance procedures are inadequate to protect the interests of [the trustees] until [the trustees] have attempted to implement the procedures and found them so", *Republic Steel Corp. v. Maddox, supra.*

In *Central States Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980) the Seventh Circuit held that fund trustees were obligated to attempt to exhaust the grievance and arbitration provisions of underlying collective bargaining agreements. It observed, "This is not a simple collection case, but a case turning on which, if any, of the disputed workers are covered by the contract. Until that question is resolved, it is impossible to determine whether there is any delinquency on which to base a collection action;" and pointed out that fund trustees "need only inform the Union, the members of which the funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interests, to file a grievance against Martin", 625 F.2d at 172-173. Citing *Howard Martin* the Ninth Circuit in *Laborers Health and Welfare Trust Fund v. Kaufman & Broad of North California, Inc.*, 707 F.2d 412 (9th Cir. 1983) said, "Where the trust funds are the aggrieved party, they may be required to trigger the arbitration process by informing the Union of an arbitrable dispute ... They thus stand in the same position with respect to arbitration as parties to the collective bargaining agreements ...", 707 F.2d at 417 n.6.

In the case at bar, the Court of Appeals erred in rejecting the view of the Seventh Circuit in *Howard Martin* and adopting the contrary view of the Eighth Circuit in *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983) *(en banc)* cert. filed App. A at 11a-13a.

In *Robbins* the majority apparently perceived the duty of fair representation as an inadequate safeguard for fund trustees in the exercise of their fiduciary obligations. It quoted from this Court's opinion in *Vaca v. Sipes, supra,* the statement that "A union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled a grievance short of arbitration"; and said, "As the Supreme Court has

held ... the Union has no affirmative duty to represent those who are no longer members", 700 F.2d at 442.

No basis whatsoever existed for the majority's skepticism of a union's duty of fair representation. A cause of action against a union for breach of this duty may exist even though the union processed a grievance through arbitration, *Hines v. Anchor Motor Freight, Inc., supra.* It arises when a union acts in a "discriminatory, dishonest, arbitrary, or perfunctory fashion", *Del Costello v. International Brotherhood of Teamsters, supra.*

Moreover, the absence of an "affirmative duty" on a union to "represent those who are no longer members" has no relevance to the fiduciary obligations of fund trustees. In *United Mineworkers of America Health and Retirement Funds v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226 (1982), this Court held that fund trustees fulfilled their fiduciary obligations by administering the funds in accordance with the terms of the underlying collective bargaining agreements, even though "potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements ... [W]hen neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract", 102 S.Ct. at 1233-34.

In short, because the Pension Trustees and Welfare Trustees claimed that Consolidated breached the collective bargaining agreements, they were obligated at least to attempt to exhaust the mandatory grievance and arbitration procedures specified in those agreements. Their failure to do so constituted a defense to this suit for alleged violation of the agreements. The Court of Appeals' erroneous contrary holding on this vitally important issue must be corrected.

II. THE COURT OF APPEALS' HOLDING THAT THE UNION WAS NOT REQUIRED TO EXHAUST MANDATORY GRIEVANCE AND ARBITRATION PROVISIONS BEFORE RESORTING TO "ECONOMIC AND/OR LEGAL SANCTIONS" IS A GLARING CONTRAVENTION OF THE CONGRESSIONALLY AND JUDICIALLY DECLARED NATIONAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES, AND IS CONTRARY TO OTHER CIRCUIT COURT DECISIONS.

"Fundamental to federal labor policy is the grievance procedure ... It promotes the goal of industrial peace by providing a means for labor and management to settle disputes through negotiation rather than industrial strife ... Adoption of a grievance procedure provides the parties with a means of giving content to the collective bargaining agreement and determining their rights and obligations under it", *Bowen v. United States Postal Service, supra,* 112 L.R.R.M. at 2286. Accordingly, this Court "has established a strong presumption favoring arbitrability," *Nolde Bros., Inc. v. Balcery Workers,* 430 U.S. 243, 254 (1977). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage", *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

In the case at bar, the collective bargaining agreements between Consolidated and the Union contained grievance and arbitration provisions specifying the procedure by which "grievances or disputes as defined in this article shall be handled" and defined the term "grievance" to "mean a dispute arising between the parties to this agreement ..."

Consolidated defended the Union's claim for working dues on the ground that the Union erroneously demanded

remittances of dues for employees who were not represented by the Union and for work which was not covered by the collective bargaining agreements. The District Court aptly stated that the dispute was "essentially based on differing interpretations of the coverage clauses of the collective bargaining agreements." The agreements' grievance and arbitration provisions plainly covered this dispute, *United Steelworkers v. Warrior & Gulf Navigation Co., supra.*

Nevertheless, the Court of Appeals held that the Union "has not agreed to arbitrate its claims for working dues, regardless of whether Consolidated contends that its refusal to contribute is in some way justified." It grounded this conclusion upon the portion of the checkoff provision which stated, "Deliberate failure or refusal ... to make deduction and/or remittance as herein provided ... shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions."

In effect, therefore, the Court of Appeals concluded that it could be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" and permitted the Union to resort to "economic and/or legal sanctions" without exhausting the agreements' grievance and arbitration procedures.

This ruling is in direct contravention of the strong federal policy favoring arbitration of labor disputes. It opens the door to the very industrial strife which grievance and arbitration provisions were designed to prevent.

In *Waverly Mineral Products Co. v. United Steelworkers of America,* 633 F.2d 682 (5th Cir. 1980) and *Johnston-Tombigbee Furniture Manufacturing Co. v. Local Union No. 2462,* 596 F.2d 126 (5th Cir. 1979) the Court of Appeals rejected claims of nonarbitrability which closely paralleled those of the Union in the case at bar. Both cases involved collective bargaining agreements which excluded from ar-

bitration the employer's exclusive right to discharge employees for just cause. The Court of Appeals in each case rejected the employer's "position of nonarbitrability" which was "based on its unilateral determination that just cause existed, when in fact the contract does not give the employer such a right to determine just cause," *Johnston-Tombigbee Furniture Manufacturing Co., supra,* 596 F.2d at 129. In so doing the Court of Appeals followed the reasoning of *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union,* 345 F.2d 757, 759 (9th Cir. 1965) in which the Ninth Circuit rejected an employer's claim of nonarbitrability which was based on its unilateral determination that an unauthorized work stoppage occurred; the agreement did "not have any clause giving" the employer the right to make that determination.

These decisions are in irreconcilable conflict with the case at bar, in which the Court of Appeals accepted the Union's position of nonarbitrability which was based upon its unilateral determination of the occurrence of a "deliberate failure ... to make ... remittance of dues as herein provided"; the collective bargaining agreements contained no provision which gave the Union the unilateral right to make any such determination. The Court of Appeals erroneously failed to "construe exclusionary clauses strictly in order to give effect to our national policy in favor of arbitration", *Johnston-Tombigbee Furniture Manufacturing Co., supra,* 596 F.2d at 129.

III. THE COURT OF APPEALS' DECISION AFFIRMING THE AWARD OF ATTORNEY FEES FOR THE UNION IS CONTRARY TO THE "AMERICAN RULE" TO WHICH THIS COURT HAS CONSISTENTLY ADHERED.

In *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975), this Court reaffirmed adherence to the "American Rule" which prohibits a "prevailing litigant" from collect-

ing "a reasonable attorney's fee from the loser", 421 U.S. at page 247.

In the case at bar, however, the Court of Appeals held that (a) the award of attorney fees to the Pension Trustees and Welfare Trustees was statutorily authorized by ERISA App. A at 18a-20a; and (b) the award of attorney fees to the Union was authorized because Consolidated acted in "bad faith, vexatiously, wantonly, or for oppressive reasons" App. A at 20a-21a.

Whatever may have been the propriety of the award of attorney fees to the Pension Trustees and Welfare Trustees, See *Bradley v. School Board of Richmond,* 416 U.S. 696, 711-716 (1974); *San Pedro Fishermans Welfare Trust Fund v. DiBernardo,* 664 F.2d 1344, 1346 (9th Cir. 1982), the award of attorney fees to the Union was plainly improper.

The conclusion that Consolidated acted in "bad faith" was grounded upon Consolidated's refusal to supply to the auditors for the Pension Trustees and Welfare Trustees records and information pertaining to matters which Consolidated contended were beyond the coverage of the collective bargaining agreements.

However, the auditors for the Pension Trustees and Welfare Trustees did not have the *carte blanche* right to examine all of Consolidated's books and records. The information to which these auditors were entitled was "expressly limited to the records of 'covered' employees", *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,* 698 F.2d 802, 808 (6th Cir. 1983) cert. filed, quoting from *Central States Southeast and Southwest Areas Pension Fund v. CRST, Inc.,* 641 F.2d 616, 618-19 (8th Cir. 1981). Access to additional information required a showing of "reasonable cause to believe that a *particular employee* is covered by the collective bargaining agreement, i.e., is doing bargaining unit work but has not been ... classified

... as a covered employee," *Central Transport, Inc., supra, 698 F.2d at 810 (emphasis the court's).*

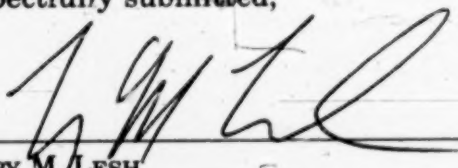
The District Court rejected Consolidated's position with regard to the coverage of the collective bargaining agreements. However, this ruling could not, in and of itself, justify an award of attorney fees against Consolidated. "Simply because the facts were found against [Consolidated] does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified. Whenever the facts in a case are disputed, a court perforce must decide that one party's version is inaccurate. Yet it would be untenable to conclude ipso facto that that party had acted in bad faith", *Runyon v. McCrary,* 427 U.S. 160, 183-84 (1976).

Thus, no basis whatsoever existed for the Union's recovery of attorney fees from Consolidated.

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded by United States Mail to all counsel of record on this 12 day of April, 1983.

APPENDIX A

APPENDIX A

FORREST BUGHER, et al.,
Plaintiff-Appellee,

v.

CONSOLIDATED X-RAY SERVICE CORPORATION
Defendant-Appellant.

No. 81-1349

United States Court of Appeals
Fifth Circuit

May 31, 1983

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, RANDALL and TATE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This case arises under §301 of the National Labor Relations Act (NLRA), 29 U.S.C. §185, and §502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1132. Allied as plaintiffs and appellees are Local Number 2 of the International Union of Operating Engineers (Union), the Trustees of the Union's Central Pension Fund (Pension Trustees)[1], and the Trustees of the Health and Welfare

[1] The Pension Trustees are Forrest Bugher, Richard Wren, Reese Hammond, J.A. McMahon, A.W. McIntyre, Hailey Roberts, John E. Cullerton, and Richard E. Dennis.

Fund of Local Number 2 (Welfare Trustees)[2]. The Trustees and the Union filed suit in federal district court, alleging that Consolidated X-Ray Service (Consolidated) had deliberately failed to contribute to the Funds and to deduct union working dues in the amounts agreed to under collective bargaining agreements. Consolidated replied with a battery of affirmative defenses, but to no avail, as the district court, after trial, held in favor of the Trustees and the Union.[3]

Consolidated contends on appeal that the district court erred (i) in concluding that the Trustees and the Union were not required to exhaust the grievance and arbitration provisions of the collective bargaining agreements, (ii) in finding that Consolidated had an enforceable obligation to contribute to the Pension and Welfare Funds, and (iii) in awarding attorneys' fees to the plaintiffs and in awarding interest of 10% compounded annually. As we find no error, we affirm the judgment of the district court.

Consolidated is in the business of "non-destructive testing" — the use of radiography and other methods to determine the strength and integrity of welds and metalic structures. In 1971, 1974, and 1977, it signed collective bargaining agreements with the Union, the coverage of which is more narrowly defined with each succeeding agreement. Each agreement, however, covers "all employees" engaged in "field non-destructive testing" for Consolidated, with certain categories of employees excluded

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[2] The Welfare Trustees are Carl B. Pratt, Vergil Belfi, John Faust and Harold B. Huhn.

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[3] *Bugher v. Consolidated X-Ray Service Corporation*, 515 F.Supp. 1180 (N.D. Tex. 1981).

under the later contracts.[4]

Each collective bargaining agreement required Consolidated to contribute to the Pension and Welfare Funds in specified amounts for each covered employee. The agreements also required Consolidated to deduct Union working dues for each employee and remit those to the Union.[5]

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[4] 1971 agreement provides:
This Agreement shall apply to and cover all employees engaged in field non-destructive testing.
The 1974 agreement provides:
This Agreement shall apply to and cover all employees engaged in field non-destructive testing, excluding Alaska, Nuclear Power Plants and visual inspection.
The 1977 agreement provides:
This Agreement shall apply to and cover all employees engaged in field pipeline or pipeline-related non-destructive testing including all employees who furnish rigs and equipment in the performance of services, excluding Alaska, Nuclear Power Plants, laboratory work and that work considered in the industry as "City" or "call-out" work; and the Company recognizes the Union as the exclusive bargaining agent for all such employees.

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[5] The successive collective bargaining agreements called for contributions by Consolidated in the following amounts:

Central Pension Fund: Effective February 17, 1971, 15 cents per hour for each hour worked by bargaining unit employees employed more than 31 days, that figure to increase to 20 cents per hour as of February 17, 1973. In 1974 the language was changed somewhat and payment set at 30 cents per hour, increasing to 40 cents per hour in 1975, 50 cents per hour in 1976, and remaining at that level through the end of the 1977-1980 contract.

Welfare Fund: Effective April 1, 1971, $31.00 per month for each month or major part thereof worked by bargaining unit employees employed more than 31 days. In 1974, the amount was changed to $42.00 per month, rising to $47.00 per month in 1975. In 1977, the rate and manner of payment was changed to 45 cents per hour for covered employees, up to a maximum of 40 hours, with the amount increasing to 50 cents per hour in 1978.

Union Working Dues: As of February 7, 1971, dues were to be deducted and remitted to the Union at the rate of 10 cents per hour worked, increasing to 15 cents per hour in 1972. The rate of 15 cents per hour was maintained through the 1974 and 1977 agreements.

In 1976, the Trustees and the Union conducted an audit of Consolidated's payroll books and records. In July of that year, they filed this suit. The Trustees sought recovery of delinquent fund contributions of $104,312.33. The Union sought recovery of delinquent working dues in the amount of $7,371.27. These figures were based upon the results of the audit, which covered the period from February 20, 1971 through December, 1975. The Trustees and the Union also requested attorneys' fees, audit expenses, interest, and a supplemental audit to determine the amount of any additional delinquency which had accrued since January, 1976.

Consolidated initiated a rebuttal audit, which uncovered a delinquency of only $143.00, which had been more than offset by contributions made since December, 1975. The parties agree as to the reason for the huge discrepancy between the results of the two audits. Consolidated did not contribute for non-Union employees or for Union employees who were not engaged in cross-country pipeline jobs, claiming that the contribution requirements of the agreements did not apply to such employees. The Union and the Trustees claim to the contrary.

Consolidated advanced this defense at trial. It also claimed that because this was a disagreement about the true meaning of the coverage clause, the agreements' arbitration and grievance provisions should have been invoked. By failing to do so, Consolidated argued, the Trustees and the Union had waived their claims.

The district court ruled against these and other affirmative defenses raised by Consolidated,[6] and rendered judg-

[6] None of the several other affirmative defenses posed by Consolidated at trial have been raised before this court.

ment in favor of the various plaintiffs. It awarded attorneys' fees, audit expenses and interest to the plaintiffs and ordered Consolidated to submit to a further supplementary audit.[7]

From this judgment Consolidated appeals.

I. Bound to Arbitrate? The Pension and Welfare Trustees

The collective bargaining agreements set forth grievance and arbitration procedures to be followed in resolving certain disputes arising under those agreements. Under those procedures, an individual employee is required first to take his complaint to his immediate supervisor. If the grievance is not thereby resolved, it must be reduced to writing and forwarded to the Union and the Company, which must attempt to resolve it. If they fail to do so, the grievance must be referred to the top officials of the Union and the Company. If those officials cannot reach an agreement, the problem may then, and only then, be submitted to arbitration. Grievances initiated by the Union itself are subject to this process, although the first step is omitted.

Under the contract, failure to meet specified time limits works a forfeiture of the grievance. The Union retains final

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[7] The court ordered payment to the plaintiffs in the following amounts:

Pension Fund ($63,114.33, less $3,272.40 credit)	
Pension Fund	$59,841.93
Welfare Fund	$41,198.00
Working Dues	$ 7,371.27
Audit Expenses	$11,554.66
Attorney's Fees	$39,375.00

authority to proceed with a dispute or to decline to do so.[8]

Consolidated claims that the question of whether particular employees are covered by the agreement is a dispute which invokes the grievance and arbitration procedures. Although the district court recognized that "[t]he differences between the two audits are essentially based on differing interpretations of the coverage clauses of the Collective Bargaining Agreements," *Bugher v. Consolidated X-Ray Service Corp.*, 515 F.Supp. 1180, 1184 (N.D. Tex. 1981), it concluded that the Trustees could not be required to exhaust the grievance and arbitration procedures, as the collective bargaining agreements contain no provision specifically requiring the funds to do so and "without specific provision in a collective bargaining agreement, welfare and pension funds should not be compelled to arbitrate their grievances with employers."

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[8] The collective bargaining agreement states:

ARTICLE XIV

Adjustment of Disputes and Arbitration

(1) Definition: For the purposes of this Agreement, a "grievance" shall mean a dispute arising between the parties to this Agreement or between any employee or employees covered by this Agreement and the Company as limited to or by the terms and conditions of this Agreement,

* * * * *

(4) Grievances or disputes as defined in this Article shall be handled in the following manner:

(a) Employees shall take up any grievance with their immediate supervisor within seventy-two (72) hours of the occurrence.

(b) If the grievance cannot be resolved, employee shall reduce the grievance to writing and forward one (1) copy to the Union and one (1) copy to the Company. The Company and the Union are required to attempt to resolve the grievance within five (5) days after step one (1) has been completed. If the grievance cannot be resolved at this step, the grievance will be referred to the top officials of the Company and the Union within ten (10) days thereafter. Grievances initiated by the Union shall be commenced as set out above in Step two except for the first sentence.

(c) If the grievance cannot be settled at the second step, the grievance may be submitted to arbitration within thirty (30) days.

(5) Failure of either party to comply with the time limits set forth above will serve to declare the grievance forfeit against the defaulting party. The time limits set forth above may be extended only by written mutual agreement.

[footnote omitted] 515 F.Supp. at 1182.

We agree with the district court that the Trustees cannot be required to exhaust the grievance and arbitration procedures set forth in this collective bargaining agreement.

This agreement defines a "grievance" as "a dispute arising between the parties to this Agreement or between any employee or employees covered by this Agreement and the Company . . ." [emphasis added]. As the trial court correctly held, "[t]he two Plaintiff Funds are not parties to the collective bargaining agreements."[9] 515 F.Supp. at 1182. Nor are they employees covered by the agreements. The dispute between the Trustees and Consolidated is not a dispute "between the parties" and therefore is not covered by the grievance and arbitration provisions of the contracts.

In reply to this argument, Consolidated cites *Central States, Southeast and Southwest Areas Pension Fund v. Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980), in which the plaintiff trustees' collection suit was held to have properly been dismissed on the grounds that the trustees were required to exhaust contractually mandated arbitration provisions. *Howard Martin* is not to the point, however. The decision in *Howard Martin* was founded upon article 8 of

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At any step in the foregoing grievance, the authorized official of the Union shall have the final authority with respect to any aggrieved employee covered by this Agreement to decline to process the grievance further if, in the judgment of such officials, the grievance lacks merit or lacks jurisdiction under the terms of this Agreement or has been adjusted or justified under the terms of this Agreement to the satisfaction of the Union.

ARTICLE XV
Grievance Procedure

(1) Any grievance that cannot be settled between the employees, the Union or the Company in accordance with the provisions of the foregoing Article and sections may be submitted to an independent arbitrator....

[9] Consolidated does not dispute this finding, nor could it, as the funds neither negotiated nor signed the collective bargaining agreements.

that particular contract, "which requires that all grievances or questions of interpretation be referred to arbitration before legal action is commenced . . . [T]he existence of the obligation to make certain payments depends upon interpretation of the contract and the contract specifically requires arbitration on questions of interpretation." 625 F.2d at 172. This contract contains no such provision. Moreover, nothing in *Howard Martin* indicates that the grievance and arbitration procedure was specifically reserved, by definition, for disputes "between the parties," as it is here. Here the Trustees are not parties. The disagreement between Consolidated and them over the meaning of the coverage clause is not a grievance and need not be funneled through arbitration.

In addition, both the Pension Trust Fund instrument and the Health and Welfare Trust Fund instrument (as amended in 1975) authorize the Trustees to go directly to court to pursue delinquent employer contributions. The Pension Fund instrument provides,

> Section 4. DEFAULT IN PAYMENT. Nonpayment by an Employer of any contributions when due shall not relieve any other Employer of his obligation to make payments. In addition to any other remedies to which the parties may be entitled, an Employer in default for ten working days may be required at the discretion of the Trustees to pay such reasonable rate of interest as the Trustees may fix on the monies due to the Trustees from the date when the payment was due to the date when payment is made, together with all expenses of collection incurred by the Trustees. The Trustees may take any action necessary enforce payment of the contributions due hereunder, including, but not limited to, proceedings at law and in equity.

The Health and Welfare Fund instrument provides,

3. 13 *Delinquency*. The Trustees shall notify an Employer, in writing, who is a party to this Trust agreement and who becomes delinquent in his payments, of the fact that said delinquency exists. In the event that any payment due from an Employer is delinquent and the Employer, after having been notified as hereinabove provided, continues to maintain its delinquency, the Trustees may, at their discretion, bring suit for collection of all amounts due and owing and if suit is brought, the Employer shall be liable, in addition to its delinquency, for Court costs, reasonable attorneys fees and liquidated damages in the amount of ten percent (10%) of the delinquent amount.

Neither instrument requires the Trustees to follow the collective bargaining agreements' grievance and arbitration procedures before taking legal action, nor has either group of Trustees agreed to do so.

In Bricklayers, Masons and Plasterers International Union of America, Local Union No. 15 v. Stuart Plastering Co., Inc., 512 F.2d 1017 (5th Cir. 1975), moreover, we stated plainly that in passing §302 of the NLRA, Congress intended to make certain that employee fringe benefit funds were independent of union control. Congress acted "to remove [employee fringe benefit] funds from the absolute control of union officials by giving employers a coordinate responsibility for their administration." 512 F.2d at 1024. The statute flatly prohibits an employer from making payments to employee representatives, with certain clearly elucidated, strictly construed exceptions.[10] One of these exceptions is for qualified trust funds which conform with the

[10] §186. Restrictions on financial transactions
Payment or lending, etc., of money
by employer or agent to employees,
representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or con-

Act's requirements.[11] To bind the Trustees to the arbitration provisions of this contract would violate Congress' intent.

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sultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value-

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

[11] §186. * * * * *

Exceptions

(c) The provisions of this section shall not be applicable.

* * * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation

To compel the Trustees to follow those procedures would place the Union in control of whether payment should in fact be demanded, in what amount, and from which employers. By carelessness or deliberate refusal to act, the Union could completely thwart the Trustees' ability to administer and ensure payments to the trust funds. Though in full possession of their fiduciary duties, the Trustees could exercise their fiduciary powers only at the Union's discretion. Such a situation would completely violate the Congressional directive that control of fringe benefit funds shall not rest with the unions.

Recently, in *Robbins v. Prosser's Moving & Storage*, 700 F.2d 434 (8th Cir. 1983) (en banc), the Eighth Circuit followed that reasoning to conclude that a group of fringe benefit fund trustees were not bound by the arbitration provisions of a collective bargaining agreement. In reaching that decision the court expressed skepticism that unions will necessarily

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for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

readily act in the best interests of fringe benefit funds, pointing to a number of respects in which the union's and the funds' interests might diverge. The court agreed that "the union and a pension fund are both fiduciaries."

> But they represent groups and interests that only partly coincide. We conclude that the national pension policy ..., and the rights of plan beneficiaries, can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts.

700 F.2d at 442.

The Eighth Circuit rejected the contrary view of the Seventh Circuit, expressed in *Howard Martin*. In *Howard Martin*, a panel of the Seventh Circuit stated,

> Lastly the Funds say they have no access to the arbitration process because Article 7 of the contract provides that arbitration may be invoked "only by the authorized Union representative or by the employer." The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin. [Footnote omitted]

625 F.2d at 173.

We find the Eighth Circuit's analysis more persuasive. To compel the Trustees to follow the contractually mandated arbitration procedures would expose the Funds to union control.[12]

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[12] Several other courts have considered whether fringe benefit fund trustees must submit claims for delinquent employer contributions to contractually set forth arbitration procedures.

Courts have held, as we do here, that the Trustees need not exhaust grievance and arbitration procedures, in *Burke v. Adams and Ells of Ells, Inc.*, 603 F.2d 114 (9th Cir. 1979); *Trustees of National Benefit Fund for Hospital and Health Care Employees v. Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir. 1982); *Wishnick v.*

One Stop Food & Liquor Store, Inc., 359 F.Supp. 239 (N.D. Ill. 1973); *Owen v. One Stop Food & Liquor Store, Inc.*, 359 F.Supp. 243 (N.D. Ill. 1973); *Todd v. Casemakers, Inc.*, 425 F.Supp. 1375 (N.D. Ill. 1977); *Central States, Southwest and Southeast Areas Pension Fund v. Gratiot Central Oil & Gas Service, Inc.*, 517 F.Supp. 811 (W.D. Mich. 1981); *O'Hare v. General Marine Transport Corp.*, 534 F.Supp. 120 (S.D.N.Y. 1981); and *Resilient Floor Decorators Insurance Fund v. Hay's Installation, Inc.*, 532 F.Supp. 829 (E.D. Mich. 1982). In *Adams and Ells*, the Ninth Circuit held that the fringe benefit fund trustees could not be compelled to arbitrate a dispute over delinquent contributions because the employer had never requested arbitration. The court explicitly did not decide "whether the district court can never compel non-signatory trustees of an employee benefit fund to arbitrate an alleged deficiency in contributions required by the collective bargaining agreement." 603 F.2d at 115. Likewise, in *Constant Care*, the Fourth Circuit found no need to decide that question. It held instead that since there was no dispute over whether contributions were owed, there was nothing for the arbitrator to decide, and arbitration could therefore not be compelled. *Wishnick* and *Owen* relied upon 29 U.S.C. §186(c) in concluding that the trustees could not be compelled to arbitrate their claim for delinquent contributions:

> Further, Congress in enacting §302 of the Labor Management Relations Act (29 U.S.C. §186) intended that Welfare and Pension Funds established in accordance with that section would be independent of exclusive control by the union. Consequently, the failure of an employer to make contributions as required by an agreement is not an arbitrable dispute in the absence of a specific provision in the agreement requiring the Trustees to submit their claims to the arbitration procedure.

359 F.Supp. at 243, 359 F.Supp. at 246.

The holding and rationale of *Wishnick* were cited with approval in *Casemakers, Gratiot Central Oil & Gas Service, and General Marine Transport Corp.* They were cited disapprovingly in *Resilient Floor*, in which specific provisions of the collective bargaining agreement allowed the Trustees to file suit for delinquent contributions without having to resort to arbitration.

Trustees were compelled to submit to arbitration in *Farmer v. Fisher*, 586 F.2d 1226 (8th Cir. 1978); *Layne Western Co., Inc. v. International Union of Operating Engineers, AFL-CIO, Local Union No. 513*, 650 F.2d 155 (8th Cir. 1981); and *IBEW, Local Union No. 308 v. Dave's Electric Service, Inc.*, 382 F.Supp. 427 (M.D. Fla. 1974). Although generally in accord with the position taken by the Seventh Circuit in *Howard Martin*, none of these cases considered the implications of Union control over the Trustees' access to the arbitration process. *Farmer* and *Layne-Western* were overruled by the Eighth Circuit in *Rollins, supra*.

We uphold the district court's decision on this issue, then, for three reasons. First, the Trustees are not parties to the agreements and therefore their dispute with Consolidated is not a "grievance" as defined by the contracts. Second, both the Pension and the Health and Welfare Fund instruments clearly authorize the Trustees to file suit to collect delinquent employer contributions. Neither group of Trustees has agreed instead to submit such claims to arbitration. Finally, to impose these arbitration procedures upon the Trustees would undermine the vitally important independence of the Pension and Welfare Funds.

The Union

The Union, in its suit for delinquent union working dues, is in an altogether different legal posture. It is undisputed that the Union, unlike the Trustees, is a party to the agreement. Moreover, the policies which inform §186(c) and ERISA with regard to the protection and independence of trust funds simply do not apply to the Union's cause of action. Therefore, its dispute with Consolidated over the meaning of the coverage clause is at least an arguable grievance. We find, however, that the Union's claim need not have been referred to arbitration.

As did the district court, we reach this conclusion by examining the express provisions of the collective bargaining agreements. Although they outline grievance and arbitration procedures, they also authorize direct legal action by the Union to redress the company's deliberate failure to remit union working dues.

> The deliberate failure or refusal by an employer to make deduction and/or remittance of dues as herein provided, following approval by the membership and upon appropriate authorization shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions.

It is true that arbitration is generally favored as a matter of federal labor policy. The Steelworkers Trilogy, *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). See also *Nodle Brothers, Inc. v. Local No. 358*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977). Nor is arbitration defeated by the fact that the meaning of a disputed clause seems "clear and unambiguous." See *Bugher*, 515 F.Supp. at 1184. "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious." *American Manufacturing*, 363 U.S. at 567, 80 S.Ct. at 1346, 4 LEd.2d at 1406.

As Justice Douglas pointed out in *Warrior & Gulf Navigation Co.*, 363 U.S. at 582, 80 S.Ct. at 1353, 4 L.Ed.2d at 1417, however, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." We are convinced by the contractual language that the Union has not agreed to arbitrate its claims for delinquent working dues, regardless of whether Consolidated contends that its refusal to contribute is in some way justified.

It is disingenuous to argue, as Consolidated does, that the clause which allows the Union to take legal action to collect unpaid working dues was meant to apply only to undisputed, acknowledged delinquencies. If that were the case, the clause would mean nothing, as the Company could always assert some reason, however specious, to justify its nonpayment. If a delinquency were truly undisputed, moreover, one assumes that legal action would not be necessary at all.

The district court correctly held that the Union was not compelled to arbitrate this particular issue.

II. Enforceable Obligation to Contribute?

Consolidated argues also that the Trustees failed to prove the existence of written trust fund instruments which conform to the stringent requirements of §186.[13] It contends that the plaintiffs must prove the existence of such instruments in order to establish an enforceable obligation to contribute to the funds.[14] Consolidated claims, therefore, that the evidence at trial was insufficient to support the trial court's finding of an enforceable obligation to contribute on Consolidated's part.

In claiming that the Trustees failed to shoulder their evidentiary burden, Consolidated relies upon language from *Stuart Plastering*: ". . . [T]he burden of establishing a qualifying trust fund must be met by the employee organi-

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[13] The requirements for a qualified trust fund, set forth in §186(c)(5) are concisely summarized in *Stuart Plastering*.

> Section 302(c)(5), on the other hand, specifically requires that employee payments must not only be held in trust, but that "the detailed basis on which such payments are to be made" must be "specified in a written agreement with the employer." Moreover, the written agreement must provide a mechanism for resolving possible disputes between the employee representative trustees and their employer counterparts. The written agreement must also provide for an annual audit of the trust fund. Finally, under §302(d), payments earmarked for pension benefits must be segregated from payments intended for any other proper purpose, and a separate trust fund must be established for the purpose of safeguarding pension benefits.

512 F.2d at 1026.

[14] The Health and Welfare Trust Fund instrument was not presented as evidence in the district court, although 1975 amendments to the instrument were. While the Pension Trust Fund instrument does appear in the record, Consolidated claims that it is in several ways inadequate to fulfill the standards of §186(c)(5). Specifically, Consolidated argues that its Pension Fund participating agreement has expired. It also contends that the Pension Fund instrument, by providing for the payment of trustees' expenses, does not properly segregate funds, and that the instrument allows the Union to control the fund by empowering the Union president to remove and replace Union-appointed Trustees.

zation representative." 512 F.2d at 1026. According to Consolidated, this language requires the Union and the Trustees to establish the funds' compliance with all aspects of §186(c) as a prima facie element of a collection suit. Failure to do so destroys the cause of action.

By taking this phrase out of context, Consolidated has utterly misconstrued its meaning. In that portion of *Stuart Plastering*, we were discussing the Union's obligation to set up the trust fund in conformance with statutory requirements. By no stretch of the legal imagination were we referring to the Union's evidentiary burden of proof in establishing its claim in a court of law.

Stuart Plastering is readily and easily distinguishable from this case. In *Stuart Plastering*, the plaintiffs admitted that there was no written trust fund agreement. The trust fund plainly did not conform to the letter of §186(c). More importantly for our case, that nonconformity was raised and argued before the district court.

The courts will not enforce an illegal collective bargaining agreement provision which obligates an employer to contribute to a fund which does not strictly meet §186(c)(5)'s requirements. Any such alleged illegality, however, must be raised before the district court. F.R.Civ.P. 8(c) provides, in pertinent part,

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Although phrased in the language of insufficiency of evidence, Consolidated's complaint about the adequacy of the trust fund instruments is in fact a claim that under §186 the collective bargaining agreements are illegal and hence unenforceable. Yet Consolidated did not question the legality of the agreements' contribution provisions in the district court. We decline to consider that issue now for the first time, on appeal.[15]

Attorneys Fees

The trial court awarded the plaintiffs attorneys' fees of $39,375, stating,

> Plaintiffs have prayed for attorneys' fees and other costs. The court concludes that under 29 U.S.C. §1132(g) and its equitable powers, that it can, and it should, award the attorneys' fees, interest and costs, including auditors' fees, requested by the plaintiffs and stipulated to be reasonable by the defendant in full.

515 F.Supp. at 1185.

Consolidated questions that award. It claims that §1132(g) (§502 of ERISA)[16] does not warrant the recovery of attorneys' fees because ERISA's standards do not govern acts or omissions which occurred before January 1, 1975. 29 U.S.C.

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[15] If in fact the funds did not conform to §186(c)(5)'s requirements, Consolidated would be subject to criminal penalties under 29 U.S.C. §186(d) for those contributions which it has made. Consolidated has not chosen to explore in detail this possible ramification of its argument.

[16] At the time of trial, in 1979, 29 U.S.C. §1132(g) provided:

Attorney's fees and costs

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

As amended in 1980, it provides:

Attorney's fees and costs; awards
in actions involving delinquent
contributions

(g)(1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of-

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 23.

Section 1145, adopted in 1980, states:

§1145. Delinquent contributions

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

This suit was brought and tried before the advent of §1145 and the amendment of §1132(g), but was decided after that time. Since the action was not one to enforce §1145, we presume that the court relied upon its discretionary authority rather than the mandate of the new §1132(g)(2). In this case, where attorneys' fees were awarded and where there was no abuse of discretion, both subsections lead to the same result on the issue of the propriety of the attorneys' fees award.

§1144.[17] Consolidated argues that the bulk of the delinquency awarded to the Trustees arose before that date and that the plaintiffs cannot be awarded fees and costs incurred in pursuing those particular pre-1975 claims. Consolidated does not question ERISA jurisdiction in this case nor does it question the fact that attorneys' fees are awardable under ERISA.

We reject Consolidated's argument that ERISA does not justify the award of attorneys' fees to the Trustees in this case. Section 1132(g) provides for an award of attorneys' fees when a valid ERISA delinquency claim is made and won. Here we have the successful prosecution of a claim for an ongoing deficiency. ERISA does not require that the attorney's endeavors be split into time spent in pursuit of the pre-1975 delinquency and time spent in pursuit of the post-1975 delinquency. To require such a division would be to require an impractical, if not an impossible task.

Of course, ERISA does not justify any award of attorneys' fees to the Union. In that regard, however, the district court correctly relied on its equitable powers. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) the Supreme Court recognized that equity allows an award of attorneys' fees "when

[17] 29 U.S.C. §1144 provides, in pertinent part:

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .' " [Citations omitted]. 421 U.S. at 258-59, 95 S.Ct. at 1622, 44 L.Ed.2d at 154. Consolidated argues that here the district court made no specific finding that Consolidated acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."

Consolidated relies upon the words and not upon their meaning. While the court did not use the phrase "bad faith," its finding in that regard was clear. The court held that Consolidated refused to contribute to the funds as required by the agreement. It concluded that before 1977 the Union and Consolidated had been engaged "in a cat and mouse game" by which the Union "tried to enforce the written contract as best it could *in the face of Defendant* but was not always successful." [emphasis in original] 515 F.Supp. at 1184. It found that Consolidated had hobbled the plaintiffs' efforts to audit Consolidated's records by refusing to turn over certain reports and contracts. It found Consolidated to have committed fraudulent concealment by representing that its reports of contributions were full and complete. These conclusions meet the "bad faith" standard set forth in *Alyeska*. Consolidated alleges no abuse of discretion in this regard and we find none.

III. The Interest Issue

[11] The court assessed interest

> [F]rom the date each delinquent monthly contribution came due, at the rate of 10 percent per annum, compounded annually for the audit period of February 20, 1971 through December 31, 1975, together with all costs of Court incurred, and with interest at the aforesaid rate, from the date of entry of this Judgment until satisfaction or execution thereof.

Consolidated objects to that figure, arguing that under 28 U.S.C. §1961, before its amendment in 1982, interest should have been set in accordance with Texas law at 6% per annum for prejudgment and 9% per annum for postjudgment interest. We find no merit in this argument. The court's award was proper under F.R.Civ.P. 54(c) and the express terms of the trust fund instruments.[18]

We find no error on the part of the district court.

AFFIRMED.

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[18] The Pension Fund trust instrument provides,

". . . [A]n Employer in default for ten working days may be required at the discretion of the Trustees to pay such reasonable rate of interest as the Trustees may fix on the monies due to the Trustees from the date when the payment was due to the date when the payment is made. . . ."

The 1975 amendment to the Agreement and Declaration of Health and Welfare Trust provides, in the case of delinquency, for "...liquidated damages in the amount of ten percent (10%) of the delinquent amount."

APPENDIX B

APPENDIX B

IN THE

United States District Court

for the

Northern District of Texas

DALLAS DIVISION

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J.A. MCMAHON, A.W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS, and CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 2, AFL-CIO

vs.

CONSOLIDATED X-RAY SERVICE CORP.

CA-3-76-0929-C

OPINION

Defendant entered into contracts with Plaintiff Local Union 2 in 1968, 1971, 1974, 1977 and 1980 in which it agreed to pay sums to the Plaintiff Trustees on behalf of some of its employees and to withhold union dues from its union employees and remit them to the Plaintiff Local, all sums to be paid on a regular basis.

Plaintiffs contend that Defendant has not paid all sums due and that because of this deficiency, they have had to conduct one audit of Defendant's books and must conduct another so as to discover Defendant's liability.

The Court finds jurisdiction under the National Labor Relations Act, 29 U.S.C. §185 and Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132.

Defendant is a Nevada corporation whose principal place of business is in Dallas, Texas. It is in the business of conducting nondestructive testing in laboratories and in the field. It does conduct its business in interstate commerce.

Plaintiff I.U.O.E. Local 2 is a labor organization based in St. Louis, Missouri. It represents employees engaged in nondestructive testing in all states of the Union.

The other two Plaintiffs are a pension fund and a health and welfare fund benefiting the members of the Plaintiff Union. The Plaintiff Funds are third-party beneficiaries of agreements entered into by Local 2 and various employees engaged in non-destructive testing, including the Defendant.

Plaintiff Local and Defendant have entered into a series of three-year collective bargaining agreements. The first covered 1968-71. The second from 1971 to 1974. The third from 1974 to 1977. The fourth from 1977 to 1980. The fifth, and current, from 1980 until 1983.

Defendant also agreed to make contributions to the Plaintiff Pension Fund in a Participating Agreement signed in 1971.

Each of the collective bargaining agreements stated the coverage of the agreement in the first article of the agreement.

The first agreement that we are concerned with here is the 1971-1974 agreement. Article I of that agreement specified:

> This agreement shall apply to and cover all employees engaged in field nondestructive testing.

Article I of the 1974-1977 agreement was changed to read:

> This agreement shall apply to and cover all employees engaged in field nondestructive testing, excluding Aleska, Nuclear Power Plants and visual inspection.

The language of Article I of the 1977-1980 agreement was changed significantly. It read:

> This agreement shall apply to and cover all employees engaged in field pipeline, or pipeline related nondestructive testing including all employees who furnish rigs and equipment in the performance of services; excluding Aleska, Nuclear Power Plants, laboratory work and that work considered in the industry as "city" or "call-out" work; and the Company recognizes the Union as the exclusive bargaining agent for all such employees.

In these collective bargaining agreements and in the pension fund participating agreements, Defendant agreed to deduct contributions to the two Plaintiff funds and dues to the Plaintiff Union.

Plaintiffs charge that Defendant failed to properly deduct these contributions and dues and remit them to the respec-

tive Plaintiffs in accord with the coverage of the three respective Articles I.

Defendant's principal defenses are:

1) All sums have been properly paid,

2) Plaintiffs are barred from suit because of either the applicable Statute of limitation or laches, and

3) Plaintiffs must submit this dispute to arbitration.

These contentions shall be discussed in reverse order.

Arbitration

It is clear that the two Plaintiff Funds are not parties to the collective bargaining agreements. They are, at most, third-party beneficiaries of those agreements. The collective bargaining agreements do contain arbitration clauses, but the participation agreements do not contain arbitrative clauses. The collective bargaining agreements do not specifically require the Plaintiff Funds to arbitrate any grievances that they may have with the Defendant. As has been held before, Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, mandates that welfare and pension funds should be controlled by the unions and that without specific provision in a collective bargaining agreement, welfare and pension funds should not be compelled to arbitrate their grievances with employers.[1] So the Plaintiff Funds need not submit their claims to arbitration and are properly before this Court.

Though Plaintiff Union is bound to arbitrate various grievances that it may have with Defendant, this is not one of those grievances.

Article VII, section (1) of the 1970 agreement, Article VI, section (1) of the 1974 agreement and Article VI, section (1) of the 1977 agreement all end with the same last sentence.

[1] See *Owen v. One-Stop Food and Liquor Store*, 359 F.Supp. 243 (N.D. Ill., 1973).

That sentence reads:

> The deliberate failure or refusal by an employer to make deduction and/or remittance of dues as herein provided, following approval by the membership and upon appropriate authorization shall constitute a gross breach of contract in consequence of which the Union may take appropriate economic and/or legal sanctions.

As Plaintiff Union contends that Defendant has deliberately failed or refused to deduct and remit dues, it is clear that under this language of the agreements, that it could either strike or sue Defendant and it has chosen to sue.

Statute of Limitations or Laches

Each of the contracts that the Parties have entered into are written and are therefore governed by Article 5527 of Vernon's Annotated Texas Civil Statutes.[2] But the limitations period is inconsequential in this case as it has been tolled by the actions of the Defendant.

Each of the Collective Bargaining Agreements required Defendant to report and remit the withheld dues and fund contributions on a regular basis. Defendant's officers and employees did make the required reports.

Those report forms contained a certification clause which reads as follows:

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[2] Art. 5527 read at the time of the filing of this Civil Action:

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade or merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

> We certify that this report is a true and complete report of the hours worked by employees represented in collective bargaining by the local union shown above and such other employees as may be approved by the board of trustees but in no event includes any other employees, owners, partners or proprietors of this firm.

Plaintiffs' central contention is that there were additional hours worked by employees covered by the collective bargaining agreement that were not reported and for which dues and fund contributions were not remitted. Plaintiffs are saying that these certifications were false and misleading.

In Texas Law, this is fraudulent concealment which tolls a statute of limitations. See *Atlantic Richfield Co. vs. CRA, Inc.* 430 F.Supp. 1299 (N.D. Tex., 1975). A directly comparable situation to the present one was presented in *Seymour v. Hull and Moreland Engineering*, 418 F.Supp. 190 (C.D., Cal., 1976). That Court held that that employer was in a position of trust and confidence as to the trustees of those funds and that the breach of trust by the employer tolled the pertinent statute of limitation. This Court agrees with the reasoning behind that decision and finds the statute of limitation was tolled and that Plaintiffs may seek damages as far back as they have asked for, back to February 20, 1971.

The claim for laches is based on a letter of July 30, 1974, which was sent to Defendant by an attorney for the Plaintiff Local.[3] This letter purported to terminate the then current collective bargaining agreement.

Apparently, Plaintiff Local and Defendant were having difficulties at that time and the Business Manager of Plaintiff Local instructed the attorney to send the letter. Subsequently at the behest of Defendant's President, a meeting

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[3] Defendant has also alleged estoppel but if there is any difference between laches and estoppel, the Court sees no significant difference in this instance.

was held, the difficulties were ironed out, it was agreed that the letter would be withdrawn and no strike would take place. Moreover, Defendant continued to employ the same employees that were covered by the current collective bargaining agreement and continued to make remittances of dues and fund contributions without skipping a beat.

If there are any laches in this instance, they must run against Defendant. Defendant cannot be allowed to *continue* to plead the termination of a contract when it continued to accept the benefits of that contract years after the purported termination of the contract. To do so would be fundamentally unfair to the Plaintiffs. This the law will not allow.

Proper Payment of Dues and Contributions

The difficulties between the Plaintiffs and Defendant mentioned above were apparently ongoing. In an effort to put the major disputes in dollar and cents terms, the Plaintiffs authorized an audit of Defendant's books and records. This audit was commenced without objection of the Defendant pursuant to a provision of the Trust Agreement of Plaintiff Pension Fund which Defendant had agreed to be bound by when it signed the Participating Agreement. The audit was performed over a one working week period in early February, 1976.

During the audit, Defendant's President refused to turn over to the auditor the weekly time reports of its employees and its contracts with clients. Without these records, it was impossible for the auditor to discern the duties of the individual employees and the work performed on the various jobs.

The auditor went ahead with the audit and on June 3, 1976, Defendant was presented with a bill for dues, contributions and costs of the audit along with a copy of the transcribed work papers of the audit.

The costs and expenses of the audit that were billed were $11,554.66. The Pension Fund contributions billed were in the sum of $63,114.33. The Welfare Fund contributions billed were $41,198.00. And the working dues came to a total of $7,371.27.

Upon the failure of Defendant to pay these sums by July 2, 1976, as requested on June 3, 1976, this civil action was commenced on July 12, 1976.

In 1977, Defendant had prepared what amounts to a rebuttal audit. The differences between the two audits are essentially based on differing interpretations of the coverage clauses of the Collective Bargaining Agreements as set out above.[4]

Defendant's rebuttal assumed that the Collective Bargaining Agreement covered employees who were members of Plaintiff Local and who were working on cross-country pipeline jobs. Plaintiffs say that the agreements speak for themselves and are clear and unambiguous.

The Court agrees with Plaintiffs. Moreover, the clear language of these contracts has been upheld by a court before. The Court in *Forrest Bugher, et al vs. Cleveland X-Ray Inspection and Cleveland Industrial Testing, Inc.*, (Case No. C-77-186-B, N.D. Oklahoma, Nov. 22, 1978) held that the same language that is before this Court meant what it said. That all employees engaged in field nondestructive testing were covered by the contract, not just union members who worked on cross-country pipelines.

The dictionary definition of "field," does seem to be sufficient.

> (A)n area where practical work is done as by a social worker, geologist, etc., away from the central office laboratory, or the like ...,[5]

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[4] Plaintiffs have conceded an error in the sum of $3,272.40 for Pension Fund contributions.

[5] Webster's New World Dictionary 519, at 8.a (2nd College Ed. 1970).

Defendant has contended that there have been parole agreements which have modified the usage of the term "field" or that it has a special meaning in the nondestructive testing business. Besides trying to change the terms of a written contract without a showing of a new consideration, the Court does not find the facts to be as alleged by Defendant. Before the substantial change in the coverage clause in the 1977-1980 contract, it appears that Defendant and Plaintiff Union were in a cat and mouse game. Plaintiff Union tried to enforce the written contract as best it could in the face of Defendant but was not always successful.

Also, the contracts are clear in stating that "employees" are covered, not just union members. This language, too, speaks for itself. Moreover, it would appear that this language is mandatory. The Labor-Management Relations Act makes it mandatory that a labor union represent all the employees of a bargaining unit, not just the union members.[6]

As to hours worked, the contracts are clear in guaranteeing 40 hours per week per employee in Article VII, paragraph 11.

So Defendant is liable to Plaintiffs for contributions due for all employees working on nondestructive testing in the field on a 40-hour per week basis.

The differences between Plaintiffs' audit and Defendant's rebuttal audit may be attributable to two things. First, Defendant's refusal to remit contributions and dues on the above basis. Second, any inaccuracies in Plaintiffs' audit that were caused by Defendant's unwillingness to turn over its records to the auditor.

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[6] 29 U.S.C. § 159.

So the Court finds that it accepts the assumptions underlying Plaintiffs' audit and rejects Defendant's counteraudit. Judgment will therefore be given in the sums shown on Plaintiffs' audit minus the credit mentioned in footnote 4.

The Court will also retain jurisdiction of this Civil Action and order the Defendant to submit to a further audit so that Plaintiffs' recovery shall be complete.

Plaintiffs have prayed for attorneys' fees and other costs. The Court concludes that under 29 U.S.C. § 1132(g) and its equitable powers, that it can, and it should, award the attorneys' fees, interest and costs, including auditors' fees, requested by the Plaintiffs and stipulated to be reasonable by Defendant in full.

Plaintiffs' counsel are requested to propose a form of Judgment in line with the rulings of this opinion.

_____

UNITED STATES DISTRICT JUDGE

_____

DATE

IN THE

United States District Court
for the
Northern District of Texas

DALLAS DIVISION

FORREST BUGHER, RICHARD WREN, REESE HAMMOND, J.A. MCMAHON, A.W. MCINTYRE, HAILEY ROBERTS, JOHN E. CULLERTON and RICHARD DENNIS, as Trustees of the CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS,

and

CARL B. PRATT, VERGIL BELFI, JOHN FAUST and HAROLD B. HUHN, as Trustees of the HEALTH AND WELFARE FUND OF LOCAL 2, INTERNATIONAL UNION OF OPERATING ENGINEERS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 2, AFL-CIO

vs.

CONSOLIDATED X-RAY SERVICE CORP.

Civil Action No. CA-3-76-0929-C

FINAL JUDGMENT AND ORDER

The above styled and captioned Civil Action came on for trial in open Court, and the parties were heard to present their pleadings, their evidence, and arguments of Counsel, including Briefs and Supplemental Briefs filed by both the Plaintiffs and the Defendant, whereupon the Court in due course, entered the Opinion of June 2, 1981, containing findings of fact and conclusions of law.

As is more particularly set forth in the Pleadings, and Briefs, and the Opinion of the Court previously filed, the Defendant has been bound unto the Plaintiffs for contributions to the Plaintiff Funds, and unto the Plaintiff Union for withheld dues, by virtue of Collective Bargaining Contracts beginning in 1968 and successively renewed triennially, the current Collective Bargaining Contract being in force and effect until 1983.

Based upon Section 301 of National Labor Relations Act, 29 U.S.C., 185, the Court finds jurisdiction by virtue of the express grant therein, and concurrently, the Court finds jurisdiction pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C., 1132.

As established at the trial of this cause, and more particularly set forth in the Opinion of June 2, 1981, the Court finds that the Defendant is indebted to the Plaintiffs in the following amounts:

Pension Fund ($63,114.33, less $3,272.40 credit)

Pension Fund	$59,841.93
Welfare Fund	$41,198.00
Working Dues	$ 7,371.27
Audit Expenses	$11,554.66
Attorney's Fees	$39,375.00

Judgment is accordingly entered for Plaintiffs in the amount of $159,340.86, together with interest thereon, from the date each delinquent monthly contribution came

due, at the rate of 10 percent per annum, compounded annually for the audit period of February 20, 1971 through December 31, 1975, together with all costs of Court incurred, and with interest at the aforesaid rate, from the date of entry of this Judgment until satisfaction or execution thereof.

Pursuant to Rule 54(b), the Court finds no just cause for delay in the entry of this Judgment as part of a multiple claim. Accordingly, the foregoing Judgment is hereby entered as a Final Judgment, for which Plaintiffs are awarded execution.

As a separate claim, Plaintiffs seek injunctive relief requiring the Defendant to submit appropriate books and records for the period beginning with the end of the previous audit and to the current date. As set forth in the Opinion, the Court concludes that Plaintiffs are entitled to such supplemental audit, and it is accordingly

ORDERED, ADJUDGED, AND DECREED that Defendant shall be, and hereby is, enjoined from failing and refusing to supply and make available for inspection by Plaintiffs, and Plaintiff's Auditors, at Plaintiff's place of business, for purposes of a supplemental audit, each and every document, record or ledger reasonably necessary for a determination of the amounts, if any, due Plaintiffs for the period beginning with the day first following the previous audit through the payroll period immediately preceding such supplemental audit. Such documents shall include, but not be limited to, Payroll Ledgers, State Unemployment Returns, Service Contracts, Time and Expense Sheets, Weekly Time Reports, Radiation Exposure Records, Job Classification Documents, Earnings Records, reports submitted to the Internal Revenue Service, work assignments, work classifications and expense vouchers and shall be offered within 30 days of entry of this Order. Within 30 days thereafter, Plaintiffs shall file with the Clerk of this Court a verified audit

setting forth any amounts claimed due and owing, and Defendants shall have 30 days in which to submit objections or a rebuttal audit. The findings of the Court heretofore entered shall be binding for purposes of determining inclusion or exclusion of personnel, and for purposes of construing contract language.

Upon submission of such supplemental audit and any response thereto, the Court shall enter such Judgment as may be due unto Plaintiffs, including supplemental audit fees, and reasonable Attorney's fees incurred by Plaintiffs since September 30, 1980, together with interest and costs of Court.

DATED: July 2, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX C

APPENDIX C

FORREST BUGHER, et al.
Plaintiff-Appellee,

v.

CONSOLIDATED X-RAY SERVICE CORPORATION
Defendant-Appellant.

No. 81-1349.

United States Court of Appeals
Fifth Circuit

Aug. 12, 1983.

Appeal from the United States District Court for the Northern District of Texas; W.M. Taylor, Jr., Judge.

On Petition for Rehearing and Suggestion for Rehearing En Banc
(May 31, 1983, slip op. 4727, 705 F.2d 1426)

Before BROWN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Suggestion for Rehearing En Banc is DENIED.

We write today to clarify one aspect of our opinion in this case. This point is not raised in either appellant's Petition for Rehearing or its Suggestion for Rehearing En Banc.

In *National Stabilization Agreement v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981), the D.C. Circuit held that an employer may not successfully assert the invalidity of the trustee selection process as a defense to an action for delinquent trust fund contributions. This Court cited that decision approvingly in *Central Florida Sheet Metal Contractors Association, Inc. v. NLRB*, 664 F.2d 489, 498 (5th Cir. 1981).

In the present case, a collection suit for delinquent contributions, Consolidated contended that the Pension Fund contribution provisions of the collective bargaining agreements were unenforceable because, among other things, the trustee selection and replacement process allowed the Union to control the Fund, in violation of 29 U.S.C. §186(c)(5). We refused to consider this and other objections to the structure of the Pension Fund on the ground that Consolidated had waived those objections by failing to raise them before the district court, 515 F.Supp. 1180. Our decision on that issue was based entirely upon Consolidated's failure to plead, under F.R.Civ.P. 8(c), the supposed illegality, due to structural defects in the Fund, of the collective bargaining agreements' contribution provisions. We did not consider the issue of whether flaws in the trustee selection and replacement process may in fact serve as a defense to a collection suit for delinquent trust fund contributions.

The Petition for Rehearing is also DENIED.

APPENDIX D

APPENDIX D

AN ACT
THE NATIONAL LABOR RELATIONS ACT

Title II - Conciliation of Labor Disputes In Industries Affecting Commerce; National Emergencies

FUNCTIONS OF THE SERVICE

SEC. 203.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. .

* * *

Title III
SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such

labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be con-

strued to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or

both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of

the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, that no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, that the requirements or clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, that no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workmen's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

[ED. NOTE: Subsections (a), (b), and (c) were amended by Section 505 of the Labor Management Reporting and Disclosure Act of 1959. The amendments revised Secs. (a) and (b), expanded subsection (c), and added subsections (a)(2), (3), and (4); (b)(2); and (c)(6). Subsection (c)(7) was added by P.L. 91-86, October 14, 1969.

Subsection (c)(8) was added by P.L. 93-95, August 15, 1973.

Subsection (c)9 was added by P.L. 95-524, October 27, 1978.]

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise

lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.